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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 WAPATO HERITAGE, LLC, a
10 Washington Limited Liability
11 Company; KENNETH EVANS; JOHN
12 WAYNE JONES; and JAMIE JONES,
13 individual residents of
14 Washington State,

15 Plaintiffs,

16 v.

17 SANDRA D. EVANS, an
18 individual, not a resident of
19 Washington State; and DAN
20 GARGAN, a citizen of Arizona,

21 Defendants.

22 NO. CV-07-314-EFS

23 **ORDER DENYING DEFENDANT
24 GARGAN'S MOTION TO DISMISS,
25 GRANTING AND DENYING IN PART
26 DEFENDANT GARGAN'S MOTION TO
 STRIKE EXPERT WITNESSES, AND
 GRANTING AND DENYING IN PART
 DEFENDANT GARGAN'S MOTION TO
 STRIKE UNDISCLOSED DAMAGE
 COMPUTATIONS**

27
28 BEFORE THE COURT, without oral argument, are Defendant Dan Gargan's
29 Motion to Dismiss For Failure to State a Claim Pursuant to Rule
30 12(b) (6) (Ct. Rec. 39), Motion to Strike Plaintiffs' Experts for Failure
31 to Disclose Reports (Ct. Rec. 43), and Motion to Strike Undisclosed
32 Damage Computations and Evidence (Ct. Rec. 46). The Court has reviewed
33 the motions and submitted materials and is fully informed. The Court
34 denies Defendant Gargan's motion to dismiss, grants and denies in part
35 his motion to strike expert witnesses, and grants and denies in part his
36 motion to strike undisclosed damage computations and witnesses. The
37 reasons for the Court's Order are set forth below.

I. Background

Plaintiffs entered into a Settlement and Release Agreement (the "Settlement Agreement") with Defendant Sandra D. Evans on or about September 2, 2005. Plaintiffs allege that Defendant Evans breached the Settlement Agreement by failing to deliver to Plaintiffs any of the funds required by Section IV.H.3. and by failing to pay Plaintiffs the excess distribution she received from the Bureau of Indian Affairs IIM account of her deceased husband, William Wapato Evans. Plaintiffs further allege that Defendant Gargan, as Defendant Evans' financial advisor, tortiously interfered with Plaintiffs' reasonable contractual expectations by advising Defendant Evans in connection with the alleged breaches of the Settlement Agreement. Plaintiffs seek damages caused by Defendant Evans' alleged breaches and Defendant Gargan's alleged tortious interference, a declaratory judgment and the specific performance of Defendant Evans' duties under the Settlement Agreement, and an injunction prohibiting Defendants from interfering with the payments due Plaintiffs.

17 Defendant Gargan asserts that Plaintiffs' Complaint pleads
18 insufficient facts to establish allegations of improper purpose necessary
19 to establish tortious interference.

II. Discussion

A. Motion to Dismiss

22 Defendant Gargan moves to dismiss the tortious interference claim
23 because the Complaint pleads insufficient facts to suggest any plausible
24 basis for the element of improper purpose.¹ (Ct. Rec. 41.) Plaintiffs

¹ Because Defendant Gargan sought dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the Court will limit its analysis to that issue.

1 respond that the Complaint adequately states a claim against Defendant
 2 Gargan for tortious interference, but seek the opportunity to amend if
 3 Complaint is insufficient. (Ct. Rec. 52.)

4 **1. Standard**

5 A motion to dismiss pursuant to Federal Rule of Civil Procedure
 6 12(b)(6) tests the legal sufficiency of the claims asserted in the
 7 complaint. FED. R. CIV. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731
 8 (9th Cir. 2001). In ruling on a motion pursuant to Rule 12(b)(6), a
 9 court must construe the pleadings in the light most favorable to the
 10 plaintiff and must accept all material allegations in the complaint, as
 11 well as any reasonable inferences drawn therefrom. *Broam v. Bogan*, 320
 12 F.3d 1023, 1028 (9th Cir. 2003); see also *Chang v. Chen*, 80 F.3d 1293
 13 (9th Cir. 1996). A complaint may not be dismissed for failure to state
 14 a claim where the allegations plausibly show that the pleader is entitled
 15 to relief; but this showing requires more than a recitation of the
 16 elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 127 S. Ct.
 17 1955, 1965 (2007). A complaint must contain enough factual matter to
 18 raise a reasonable expectation that discovery will reveal evidence that
 19 will satisfy the claim. *Id.*

20 In spite of the deference the court is bound to pay to the
 21 plaintiff's allegations, it is not proper for the court to assume that
 22 "the [plaintiff] can prove facts which [he or she] has not alleged."
 23 *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*,
 24 459 U.S. 519, 526 (1983). If the court finds that the complaint is

25
 26 treat this motion as a request for summary judgment. Therefore, the
 Court only considers matters contained in the pleadings.

1 insufficient as pled, the court should provide plaintiff with an
 2 opportunity to amend the complaint unless the pleading "could not
 3 possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203
 4 F.3d 1122, 1127 (9th Cir. 2000). Motions to dismiss are viewed with
 5 disfavor and are rarely granted. *Hall v. City of Santa Barbara*, 833 F.2d
 6 1270 (9th Cir. 1986).

7 **2. Analysis**

8 In order to prove tortious interference, Plaintiffs must prove the
 9 following elements:

10 (1) the existence of a valid contractual relationship or
 11 business expectancy; (2) the defendant's knowledge of and
 12 intentional interference with that relationship or expectancy;
 13 (3) a breach or termination of that relationship or expectancy
 induced or caused by the interference; (4) an improper purpose
 or the use of improper means by the defendant that caused the
 interference; and (5) resultant damage.

14 *Eugster v. City of Spokane*, 121 Wn. App. 799, 811 (2004).

15 The Complaint addresses each of the five tortious interference
 16 elements. (Ct. Rec. 1.) The Settlement Agreement, as suggested in
 17 paragraphs 11-15 of the Complaint, created a valid contractual
 18 relationship. Paragraphs 26 and 27 assert that Defendant Gargan, as
 19 Defendant Evans' financial advisor, "suggested, advised, aided and/or
 20 abetted" in her breaches of the Settlement Agreement described in
 21 paragraphs 17, 18, and 19. Paragraph 28 characterizes these actions as
 22 a tortious interference with Plaintiffs' contractual expectancies. These
 23 assertions establish Defendant Gargan's knowledge of and intentional
 24 interference with the Settlement Agreement and that Defendant Evans'
 25 alleged breaches were induced by Defendant Gargan's alleged tortious
 26 interference. While Plaintiffs' factual allegations relating to

1 Defendant Gargan's interference with Defendant Evans' obligations under
2 the contract are brief, Rule 8(a)(2) requires only that the plaintiff
3 give a short and plain statement of the claim and its basis. FED. R. CIV.
4 P. 8(a)(2).

5 The fourth element is addressed in paragraph 29, which suggests that
6 Defendant Gargan's alleged actions were performed for an improper
7 purpose. Although specific facts were not pled to identify Defendant
8 Gargan's alleged improper purpose, it is a reasonable inference from the
9 facts relating to Defendant Evans' alleged breaches of the Settlement
10 Agreement that Mr. Gargan, as a financial advisor, engaged in this
11 alleged conduct to profit to the detriment of Plaintiffs. Finally,
12 paragraph 30 asserts that Defendant Gargan's alleged actions, along with
13 Defendant Evans' alleged breaches, damaged Plaintiffs. After construing
14 the Complaint in the light most favorable to Plaintiffs and accepting all
15 material allegations, the Court concludes that the Complaint states a
16 claim against Defendant Gargan for tortious interference with the
17 Plaintiffs' contractual expectancies.

18 **3. Conclusion.**

19 Taking into account the Complaint's allegation that Defendant Evans
20 breached the Settlement Agreement and Defendant Gargan's involvement in
21 those breaches, the Court concludes that the facts outlined in
22 Plaintiffs' Complaint plausibly show that Plaintiffs are entitled to
23 relief. Accordingly, Defendant Gargan's Motion to Dismiss is denied.

24 **B. Motion to Strike Expert Witnesses**

25 Defendant Gargan argues that Plaintiffs' Disclosure of Preliminary
26 Expert Witnesses fails to comply with the Court's Scheduling Order and

1 Federal Rule of Civil Procedure 26(a)(2). (Ct. Rec. 45.) Plaintiffs
 2 respond that the nondisclosure was substantially justified and Defendant
 3 Gargan improperly failed to attempt to meet and confer before filing the
 4 motion. (Ct. Rec. 51.)

5 Federal Rule of Civil Procedure 37 excludes evidence from an untimely
 6 disclosed witness unless the failure to disclose is substantially
 7 justified or harmless. FED. R. CIV. P. 37(c)(1). As indicated in the
 8 Scheduling Order (Ct. Rec. 27), failure to identify expert witnesses and
 9 provide timely reports as required under Rule 26 may result in exclusion
 10 of expert testimony. See *Wong v. Regents of the Univ. of Cal.*, 410 F.3d
 11 1052 (9th Cir. 2005). But, upon a showing of good cause, the court may
 12 modify the scheduling order. FED. R. CIV. P. 16(b).

13 The Scheduling Order required Plaintiffs to identify expert
 14 witness(es) and serve the written report(s) under Rule 26(a)(2)(B) to
 15 Defendants no later than May 13, 2008. (Ct. Rec. 27.) The written report
 16 was to include:

17 (i) a complete statement of all opinions the witness will
 18 express and the basis and reasons for them; (ii) the data or
 19 other information considered by the witness in forming them;
 20 (iii) any exhibits that will be used to summarize or support
 21 them; (iv) the witness's qualifications, including a list of
 22 all publications authored in the previous ten years; (v) a
 23 list of all other cases in which, during the previous four
 24 years, the witness testified as an expert at trial or by
 25 deposition; and (vi) a statement of the compensation to be
 26 paid for the study and testimony in the case.

FED. R. CIV. P. 26(a)(2)(B)(i)-(vi).

On the May 13, 2008, deadline, Plaintiffs filed a brief disclosure identifying Jeffrey Neher, John McKay, and Brill Lee as expert witnesses. (Ct. Rec. 37.) Rather than discuss the insufficiency of this disclosure with Plaintiffs, Defendant Gargan filed this motion three days later,

1 asserting that Plaintiffs' inadequate disclosure prejudices him because
2 he is unable to determine what experts he needs to identify. (Ct. Recs.
3 43 and 57.)

The Court finds that Plaintiffs' Preliminary Disclosure of Expert Witnesses clearly failed to comply with the letter and spirit of Rule 26(a) (2)(B)(i)-(vi) and the Court's Scheduling Order. Plaintiffs identified the experts and their respective areas of expertise but did not identify the data or other information considered by the witness in forming their opinions, nor did it identify the witnesses' qualifications, cases in which the witnesses testified at trial, or compensation required for the testimony. (Ct. Rec. 37.) Furthermore, it failed to comply with the Scheduling Order's requirement of identifying available deposition dates. Finally, upon discovering that they needed relief, Plaintiffs failed to seek an extension of the May 13, 2008, deadline.

15 Notwithstanding these significant failures, the Court finds that an
16 extension of the Rule 26(a)(2)(B) disclosures is appropriate because
17 Plaintiffs demonstrated justification for their failure to meet the
18 disclosure deadline. The need for experts in the areas of finances, legal
19 ethics, and Native American heritage did not fully come to light until
20 Defendant Gargan's deposition was taken two court days before Plaintiffs'
21 expert reports deadline. Under these circumstances, the Court will allow
22 Plaintiffs until **June 13, 2008**², to disclose expert reports for Jeffrey
23 Neher, John McKay, and Brill Lee that fully comply with the letter and

25 ² An extension to June 13, 2008, gives Plaintiffs approximately
26 thirty (30) days to complete the reports since taking Defendant Gargan's
deposition.

1 spirit of Rule 26(a)(2)(B) and the Scheduling Order. The Court will not
2 permit Plaintiffs to identify additional experts. If Plaintiffs do not
3 wish to provide compliant report(s) by this deadline, Plaintiffs shall
4 notify the Court and opposing counsel that they are withdrawing the
5 identified expert(s). The Court extends the disclosure deadline for
6 Defendants and rebuttal experts as set forth below.

7 Accordingly, Defendant's Motion to Strike the Plaintiffs' Experts
8 for Failure to Disclose Reports is granted (limit on experts) and denied
9 in part (Plaintiffs' deadline for expert reports is extended).

10 **3. Motion to Strike Undisclosed Damage Computations and Evidence.**

11 Defendant Gargan seeks exclusion of Plaintiffs' currently undisclosed
12 damage computations and evidence for failure to comply with Rule 26(a)(1)
13 and the Court's Scheduling Order. Plaintiffs maintain that their initial
14 disclosures included a sufficient computation of damages. (Ct. Rec. 49.)
15 After reviewing the response and reply, the only remaining issue is
16 whether Plaintiffs' computation of Fourth Tier consequential damages is
17 sufficient under Rule 26(a)(1)(A)(iii).

18 Rule 26(a)(1) requires the disclosing party to make available a
19 computation of each category of damages and any supporting documents or
20 evidentiary material to the opposing party, absent a showing that a
21 protective order is necessary. FED. R. CIV. P. 26(a)(1)(A)(iii). Unless
22 the nondisclosure is substantially justified or harmless, Rule 37 bars
23 information that was required to be disclosed. FED. R. CIV. P. 37(c)(1).

24 Plaintiffs' Initial Disclosures FRCP 26 (Ct. Rec. 50) was dated April
25 15, 2008, four days after the Court's April 11, 2008, deadline. (Ct. Rec.
26 27.) Plaintiffs' Fourth Tier of Damages claims consequential damages in

1 excess of \$10,000,000. Plaintiffs do not provide any computation or
2 supporting documents relating to these claimed damages and have not sought
3 a protective order. They simply allege that they have suffered over
4 \$10,000,000 in consequential damages as a result of Defendant Evans'
5 failure to provide development funds as required by the Settlement
6 Agreement. (Ct. Rec. 50.) Plaintiffs further maintain that a precise
7 computation of Tier Four Damages is impossible because damages are ongoing
8 and contingent upon other parties. (Ct. Rec. 49.)

9 The Court finds that Plaintiffs' consequential damages computation
10 fails to comply with Rule 26(a)(1)(A)(iii). However, the Court provides
11 Plaintiffs with an opportunity to amend the Tier Four damages only until
12 **June 13, 2008.** The Court finds that Plaintiffs' untimely and insufficient
13 Tier Four damage computation harmless because the Court extended Defendant
14 Gargan's expert disclosure deadline. (Ct. Rec. 43.) Defendants were on
15 notice that a financial expert may be necessary because Plaintiffs
16 identified Mr. Neher, a financial expert, to testify concerning banking,
17 accounting, and financial aspects. (Ct. Rec. 37.) Although Defendants
18 were not advised of Mr. Neher's exact opinions regarding the Tier Four
19 damages, they had sufficient time to select a financial expert to address
20 anticipated testimony.

21 Accordingly, Defendant Gargan's Motion to Strike Undisclosed Damage
22 Computations and Evidence is granted (undisclosed damage computations and
23 evidence is excluded) and denied (Plaintiffs must provide the computation
24 and supporting documents for their \$10,000,000 consequential damages claim
25 by June 13, 2008).

26 **III. Conclusion**

Accordingly, IT IS HEREBY ORDERED:

1. Defendant Gargan's Motion to Dismiss for Failure to State a Claim
Pursuant to Rule 12(b)(6) (**Ct. Rec. 39**) is **DENIED**.

4 2. Defendant Gargan's Motion to Strike the Plaintiffs' Experts for
5 Failure to Disclose Reports (**Ct. Rec. 43**) is **GRANTED** (additional experts
6 may not be identified) **and DENIED IN PART** (Plaintiffs' deadline for expert
7 reports is extended). Plaintiffs shall serve their identified experts
8 Rule 26(a)(2) reports on Defendants no later than **June 13, 2008**.
9 Defendants shall identify their experts and serve those experts' Rule
10 26(a)(2) reports on Plaintiffs no later than **June 27, 2008**. Finally,
11 Plaintiffs shall identify their rebuttal experts and serve those experts'
12 Rule 26(a)(2) reports on Defendants no later than **July 7, 2008**. Counsel
13 are reminded of their obligation to file a Notice with the Court
14 indicating their compliance with the Scheduling Order's Rule 26(a)(2)
15 requirements.

16 3. Defendant Gargan's Motion to Strike Undisclosed Damage
17 Computations and Evidence (**Ct. Rec. 46**) is **GRANTED** (undisclosed damage
18 computations and evidence is excluded) **and DENIED IN PART** (Plaintiffs must
19 provide the computation and supporting documents for their \$10,000,000
20 consequential damages claim by June 13, 2008).

21 **IT IS SO ORDERED.** The District Court Executive is directed to enter
22 this Order and to provide copies to counsel.

DATED this 11th day of June 2008.

S/ Edward F. Shea
EDWARD F. SHEA
United States District Judge